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Supreme Court, U.S.
FILED

No. 08-593 OCT 30 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN F. KILGROE,

Petitioner,

v.

AMERICAN SHIP MANAGEMENT, LLC,
PATRIOT CONTRACT SERVICES, LLC,
SAILORS UNION OF THE PACIFIC,
MARINE FIREMEN'S UNIONS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN F. KILGROE
19081 Elm Drive
Apple Valley, Ca. 92308
(562) 480-6576
Petitioner pro se

QUESTIONS PRESENTED

1. Did the employer in a disability and age discriminating case, waive all its evidence of non-discriminatory reason for adverse employment action by never filing a contractually required grievance against the employee?

2. Did the Ninth Circuit, when ruling on a motion for summary judgment violate its own precedent *Dominguez-Curry v. Nevada Dept. of Transportation*, 424 F.3d 1027 (9th Cir. 2005) by ignoring the employee's evidence (A) the employer's admission that it had never filed a grievance against the employee; (B) direct evidence of discrimination: the employer's letter of April 5, 2005 terminating the employee because he admitted having a disability; (C) and by finding that the statute began to run from a prior grievance before the employer sent the employee home without work and before the employer breached the stipulation to arbitrate agreement by firing the employee based on evidence from the arbitration where job status was not at issue in its letter of April 5, 2005? Note that the district court found App. (4/8) that the complaint was filed 179 days after the Union's drop letter, which was timely.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental parties requiring a disclosure statement under Supreme Court Rule 29.6.

CITATIONS TO THE OPINION AND ORDERS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit is unreported. *Kilgroe v. American Ship Management et al.*, 06-56765, 06-56858 (9th Cir. August 1, 2008) App. 1.

STATEMENT OF JURISDICTION

The United States Court of Appeals affirmed the dismissal of Petitioner's case in its memorandum August 1, 2008. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1), Supreme Court Rules, Rule 13.

STATUTES INVOLVED IN THIS CASE

Federal Rules of Evidence, Rule 403 (the parole evidence rule is the substantive rule but this is the evidence rule):

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

42 U.S.C. § 12112(a):

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12102(2):

> The term "disability" means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record if such impairment; or
>
> (C) being regarded as having such an impairment.

STATEMENT OF THE CASE

The employee petitioner (employee) filed a complaint including some claims no longer urged, but with the following claims still urged, Breach of a labor contract, 29 U.S.C. § 185; Breach of the Duty of Fair Representation, 29 U.S.C. § 151 et seq., *Vaca v. Sipes*, 386 U.S. 171; Americans with Disabilities 42 U.S.C. § 12101 et seq. and state equivalent. Ca. Gov. Code 23940, Age Discrimination 29 U.S.C. §§ 216(B), 217,

626(b), Ca. Gov. Code 12949; Tortuous discharge in violation of public policy. Both Unions have defaulted and we may therefore ignore the breach of the duty of fair representation. This leaves the discrimination claims, age, disability and tortuous discharge and breach of contract all dismissed on motion for summary judgment and that dismissal affirmed on appeal, the three discrimination claims are dismissed on the theory that the employer had a non-discriminatory reason for Plaintiff termination that plaintiff could not do the work. The breach of contract is dismissed on the theory that is time barred.

JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals shall have jurisdiction of appeals from all final decisions of the district court the decision appealed from, docket #177 has been certified as final by the district court as final pursuant to Fed. R. Civ. P. 54(b) although Defendants Sailors Union of the Pacific and Marine Firemen's Union are in default and not yet ruled on.

FACTS

There are two contracts and two unions; the deck department contract for the Sailors Union of the Pacific and the engine department contract for the Marine Firemen's Union both contracts have an

identical exclusive grievance procedure which requires that all grievances be reduced to writing prior to payoff shortly before the employee disembarks. On motion for summary judgment counsel for the employer argued that if a grievance is not timely filed it may never be raised. In the employee's five years of employment in both the departments the employer admitted that it had never filed a grievance against the employee and has so admitted in answering request for admissions. Thus by never filing a grievance the employer waived any evidence that the employee could not do the work, the employer's only alleged non-discriminatory reason for the employee's termination and the Court of appeals sole reason for affirming the dismissal of the employee's disability discrimination claim, age discrimination claim and claim for tortuous discharge in violation of public policy.

In its letter of termination the employer said: "At the arbitration you admitted that you had attention deficit (hyperactive) disorder and poor short term visual memory." This is direct evidence that the employee was fired for admitting that he had a disability, coupled with the waiver of the employer's evidence.

In appellants brief before the court of appeals on pages 16-19 the employee raised this issue of waiver by the employer and pointed out that he had raised this issue in the trial court. The employee then incorporated pages 16-19 in defense of his age discrimination claim see appellant's brief page 26, his disability

discrimination claim on page 27 and his tortuous discharge claim page 29. The district court and appellant court both ignored the waiver issue.

The District Court found, see App. 9, " . . . when SUP initiated a new grievance on Kilgroe's behalf after [ASM] refused to accept him for employment on November 30, 2004. The statute was then tolled until April 14, 2005, when SUP notified Kilgroe that it would no longer pursue the grievance. Not for another 179 days [with some days for delay by mailing], from April 14, 2005 until October 11, 2005, when Kilgroe filed the complaint in this case," since 179 days is within the statute, the complaint was timely.

After the employee received the employers letter of April 5, 2005, that he was no longer eligible for hire based on evidence from the arbitration, the employee wrote several letters to the Union and employer that the arbitration would have to be set aside to litigate these matters because the arbitration concerned only the employees application for membership in the Marine Firemen's Union and the employees employment status and rights under the SUP contract were not at issue. The SUP issued a new drop letter on May 10, 2005, which is within six months of the filing of the complaint, which was therefore timely.

The district court erred when it started the statute in the prior grievance on the employee's application for Union membership which went to arbitration that arbitration was later breached by the April 5, 2005 letter of termination and the period

between the arbitration and its breach restart the whole process which the district court failed to grasp, see App. 9.

WHY THE WRIT SHOULD BE GRANTED

1. **Did the employer in a disability and age discrimination claim, waive all its evidence of non-discriminatory reason for adverse employment action by never filing a contractually required grievance against the employee?**

In this case the employer spent $285,000.00 plus in attorney fees fabricating its supposed non-discriminatory reason for the employee's termination. (Motion for Fees denied). None of its evidence is admissible under Federal Rules of Evidence Rule 403 as parole evidence offered to alter or amend the exclusive grievance procedure, section 10 of the contract. This is incorrect and wasteful.

Today discrimination law suits in great numbers are being dismissed on motion for summary judgment and affirmed on appeal when the employer proffers any excuse for an alleged non-discriminatory reason for its conduct. At least in cases involving exclusive procedures, we can reduce the trial to reviewing past grievances saving litigation cost and showing that the Court with its legal positivism is concerned with plaintiff employee issues as well as Corporate defendant issues.

2. Did the Ninth Circuit, when ruling on a motion for summary judgment, violate its own precedent *Dominguez-Curry v. Nevada Dept. of Transportation*, 424 F.3d 1027 (9th Cir. 2005) by ignoring the employee's evidence (A) the employer's admission that it had never filed a grievance against the employee; (B) direct evidence of discrimination: the employer's letter of April 5, 2005 terminating the employee because he admitted having a disability; (C) and by finding that the statute began to run from a prior grievance before the employer sent the employee home without work and before the employer breached the stipulation to arbitrate agreement by firing the employee based on evidence from the arbitration where job status was not at issue in its letter of April 5, 2005. Note that the district court found App. 9 that the complaint was filed 179 days after the Union's drop letter, which was timely.

In *Dominguez-Curry v. Nevada Department of Transportation*, 424 F.3d 1127, 1038-9 (9th Cir. 2005) the Ninth Circuit said:

> "it is not the province of the court to spin such evidence in an employer's favor when evaluating its motions for summary judgment. To the contrary all inferences must be drawn in favor of the non moving party."

In the present case the district court ignored the letter of termination, the Union's drop letter App. 1, 2, and 3 and found that the statute started to run prior to the alleged breach.

And later in *Dominguez-Curry* at 424 F.3d 1039:

> "Furthermore, in this circuit, we have repeatedly held that a single discriminatory comment by a plaintiff's supervisor or decisionmaker is sufficient to preclude summary judgment."

The employer's statement that the employee admitted a disability in the termination letter is such a statement and furthermore qualifies the employee under 42 U.S.C. § 12102(C) as a person being regarded as having such an impairment. Under *Dominguez* summary judgment is precluded.

CONCLUSION

For the above reasons the writ of certiorari should be granted.

Respectfully submitted,

JOHN F. KILGROE
19081 Elm Drive
Apple Valley, Ca. 92308
(562) 480-6576

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN F. KILGROE, Plaintiff-Appellant, v. AMERICAN SHIP MANAGEMENT, LLC; et al., Defendants-Appellees, and SAILORS UNION OF THE PACIFIC; et al., Defendants.	Nos. 06-56765 06-56858 D.C. No. CV-05-07314-AHM MEMORANDUM* (Filed Aug. 1, 2008)

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Submitted July 22, 2008**

Before: B. FLETCHER, THOMAS, and WARDLAW, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

John F. Kilgroe appeals pro se from the district court's judgment for defendants in his action alleging federal and state law violations in connection with his employment on a United States naval ship. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo. *Kimes v. Stone,* 84 F.3d 1121, 1126 (9th Cir. 1996) (dismissal for failure to state a claim); *Dark v. Curry,* 451 F.3d 1078, 1082 n.2 (9th Cir. 2006) (summary judgment). We affirm.

The district court properly dismissed Kilgroe's defamation claims because, under California law, publications in judicial proceedings and communications to an administrative agency are protected from litigation attacking those statements. *See* Cal. Civ. Code § 47(b); *Moore v. Conliffe,* 871 P.2d 204, 219 (Cal. 1994) ("[S]tatements made in the course of a private contractual arbitration proceeding are protected by the litigation privilege"); *Martin v. Kearney,* 124 Cal. Rptr. 281, 282 (Cal. Ct. App. 1975) (holding that a communication to an official administrative agency, designed to prompt action by that agency, is privileged from tort actions).

The district court properly dismissed Kilgroe's abuse of process claim because Kilgroe's allegations regarding misuse of ship logbook procedures did not demonstrate that defendants misused judicial process. *See Adams v. Superior Court,* 2 Cal. App. 4th 521, 530 (Cal. App. Ct. 1992) (explaining that a plaintiff making an abuse of process claim must show that the "process" at issue was "taken pursuant to judicial authority").

The district court properly granted summary judgment on Kilgroe's age discrimination claim because Kilgroe did not raise a triable issue that defendants' proffered nondiscriminatory reason for refusing to rehire him was a pretext for age discrimination. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000) (explaining that to survive summary judgment, a plaintiff must create a triable issue as to whether the employer's proffered reasons for the adverse employment action were pretexts for discrimination in violation of the Age Discrimination in Employment Act).

The district court properly granted summary judgment on Kilgroe's disability discrimination claim because Kilgroe did not raise a triable issue that he would have been able to perform the essential functions of his position with a reasonable accommodation. *See Cleveland v. Policy Management Systems Corp.* 526 U.S. 795, 806 (1999) (explaining that a plaintiff making a claim under the Americans with Disabilities Act bears the burden of proving that a reasonable accommodation would have enabled him to perform the essential functions of the position).

Kilgroe's remaining contentions are unavailing.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 05-7314 AHM (SSx) Date October 19, 2006

Title JOHN F. KILGROE v. APL MARINE SERVICES, LTD., ET AL.

Present: The Honorable A. Howard Matz

Stephen Montes	N/A	
Deputy Clerk	Court Reporter/Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
No Appearance	No Appearance

Proceedings: In Chambers

Pursuant to this Court's September 29, 2006 Order, the Court will now address and resolve the motion for summary judgment that Plaintiff John F. Kilgroe ("Kilgroe") filed as to his claims against Defendants American Ship Management LLC ("ASM") and Patriot Contract Services ("PCS").[1] The Court will also rule on those Defendants' motion for summary judgment on the four claims against them that are remaining.[2]

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[1] Dkt. No. 120.

[2] Dkt. No. 102.

I.

KILGROE'S MOTION FOR SUMMARY JUDGMENT

Kilgroe seeks summary judgment on his first claim, against ASM and PCS, for breach of a labor contract. (29 U.S.C. § 185). That claim is barred by the statute of limitations or (as to one aspect) by the absence of evidence, as is explained in the next section of this order, so the Court DENIES Kilgroe's motion as to ASM and PCS.

Kilgroe also purports to seek summary judgment against two unions, the Sailors Union of the Pacific ("SUP") and the Marine Firemen's Union ("MFU"), for breach of a labor contract and breach of the duty of fair representation. The status of Plaintiff's claims against those parties is somewhat unclear. The docket reflects that on December 16, 2005, plaintiff obtained a clerk's default against them, pursuant to Federal Rules of Civil Procedure 55(a). Almost immediately thereafter he requested a default judgment, which was denied as untimely on December 20, 2005. (Dkt. 19) Nevertheless, having obtained a clerk's default, Plaintiff may still be entitled to an entry of a default judgment if he complies with Rule 55, Federal Rules of Civil Procedure, and the corresponding Local Rule. It is therefore unnecessary (and would be inappropriate) to address his confusing summary judgment motion claims against the unions. For that reason, the remaining part of Kilgroe's summary judgment motion

is DENIED, but without prejudice to renewal if he fails to obtain a default judgment.

II.

SUMMARY JUDGMENT MOTION OF ASM AND PCS

On September 11, 2006, the Court issued a ruling granting summary judgment to defendant APL Marine Services, LTD. ("APL"). That ruling set forth the legal standard for summary judgment and also made certain findings about Plaintiff's relationship not only with APL, but with ASM and its affiliated entity, PCS. The Court incorporates here the previous analysis and findings in that order. Attached to this Order and incorporated herein by reference is a chronology of the applicable facts, with references to the Statement of Undisputed Facts ("SUF") that defendants filed. The following analysis is based on that summary.

A. First Claim for Relief (Breach of Labor Contract)

The statute of limitations for this claim is six months. *Del Costello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 169-70 (1983) (applying the statute of limitations from § 10(b) of the National Labor Relations Act [29 U.S.C. § 160(b)] to claims under § 301 of the Labor Management Relations Act). The statute begins to run not later than when Plaintiff becomes aware of the alleged breach and can successfully

bring a cause of action. *See, e.g., Acri v. Int'l Ass'n of Machinists & Aerospace Workers,* 781 F.2d 1393, 1393, 1396 (9th Cir. 1986).

In Paragraph 19 of the First Amended Complaint ("FAC"), Kilgroe alleges six different breaches of the contract, which are referred to as breaches (A) through (F).

Breach (A), that the Defendants did not inform Kilgroe that they had filed a charge with the Coast Guard or had classified him as ineligible for hire, refers to a development that he learned about in mid-February, 2004. (SUF ¶ 46).

In Breach (B), Kilgroe alleges that Defendants implemented changes in dispatch to exclude him from employment. The Court addresses these alleged breaches on the merits, and thus need not determine when Kilgroe became aware of them. Kilgroe may not proceed with alleged breach (B) for the reasons set forth below and in pages five through seven of the September 11, 2006 ruling granting summary judgment to Defendant APL. The Court adopts the previous analysis and findings in that order, except for statements relating only to APL.

Turning to the specific allegations in Breach (B), Kilgroe has not presented any evidence that all standby jobs were changed to require Able Bodied Seaman ("ABS") status, instead of Ordinary Seaman status. Kilgroe himself admits that on at least one instance, an ordinary Seaman *was* dispatched for a standby job. The Court previously addressed his

claims that all other Class C seamen were elevated to Class B, and that all new ordinary Seamen were brought in as Class C rather than Class D. The change of all Ordinary Seaman jobs to require Specially Trained Ordinary Seaman was part of a January 9, 2005 Memorandum of Understanding modifying and extending the SUP labor contract with ASM. This change was provided for by collective bargaining, and Kilgroe offers no evidence that it constitutes a breach of the labor contract. The Court also previously addressed and rejected Plaintiff's claim that SUP's Vice President would tell other Ordinary Seaman where to attend a STOS class, and there is no evidence that ASM or PCS were involved in the actions of SUP's Vice President. Thus, Kilgroe cannot proceed with any of the alleged breaches in Claim (B).

Claims (C) through (F) require an analysis of tolling principles in order to determine whether they are time-barred.

Claim (C) arises out of the denial of Kilgroe's request for Class C status and union membership in MFU. Kilgroe's request to the Joint Classification Committee, which was made on April 7, 2003 and denied on April 14, 2003, constituted the initiation of a grievance within the meaning of the applicable Collective Bargaining Agreement. *See, Declaration of Jeffrey L. Adams ("Adams Decl."), Ex. E, Internal Ex. 1 ("Shipping Rules")* § 10(a). Kilgroe filed a complaint with the NLRB as to that grievance on June 9, 2003, so he certainly knew of the alleged breach by then. As

to the other alleged breaches ((D)-(F)), Kilgroe knew of them by no later than August 21, 2003, when he filed a charge with the NLRB alleging that he had been wrongfully placed on the "No-Hire List." It was not until September 17, 2004 that the NLRB denied the appeals of that grievance and his other NLRB grievances and claims, including those relating to claimed breaches (D)-(F).

During the pendency of a grievance proceeding, the statute of limitations is tolled. *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509-11 (9th Cir. 1986). Calculating the passages of time and the existence of tolling periods in a light most favorable to Kilgroe, each of his breach of contract claims except for claim (B) is time-barred. The statute of limitations began to run on September 17, 2004, after the first tolling period ended, and continued to run for 76 days until December 3, 2004, when SUP initiated a new grievance on Kilgroe's behalf after PCS refused to accept him for employment on November 30, 2004. (SUF ¶ 56). The statute was then tolled until April 14, 2005, when SUP notified Kilgroe that it would no longer pursue his grievance. Not for another 179 days, from April 14, 2005, until October 11, 2005 when Kilgroe filed the complaint in this case, did the statute stop running. (SUF ¶ 58, Dkt. 1). The passage of untolled time between September 17, 2004 to October 11, 2005 totals 255 days – considerably longer than the applicable six months statute of limitations. For that reason, the Court GRANTS summary judgment to Defendants ASM and PCS on the first claim for relief.

B. Second and Third Claim for Relief (Disability Discrimination and Age Discrimination)

The Court dismisses Kilgroe's disability discrimination and age discrimination claims on the merits. Thus, it need not address Defendants' argument that these claims are barred by the statute of limitations.

1. Third Claim for Relief (Disability Discrimination)

Defendants are entitled to summary judgment on Kilgroe's Americans With Disabilities Act ("ADA") claim if they can establish without genuine refutation that Kilgroe cannot prove at least one of the required elements of such a claim. Such is the case here; Kilgroe cannot prove he is qualified for the job, even with reasonable accommodations. *Kennedy v. Applepause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996). On the *USNS Seay,* Kilgroe's served as a "wiper" in the engine department. (SUF ¶ 9). As a "wiper," Kilgroe worked at the discretion of the first engineer supervisor and spent most of his time sweeping, mopping, cleaning, and carrying heavy objects. (SUF ¶ 10). As part of his essential duties, Kilgroe was required to be in the engine room, as well as to participate in emergency drills. (SUF ¶¶ 13, 14). The engine room of the *USNS Seay* is actually a series of interconnected rooms containing the main engines, generators, steam-generating equipment, pumps, and many other pieces of machinery. (SUF ¶ 11). Thus, employees in the engine room must take things seriously, be constantly

aware of their surroundings, and concerned with safety at all times. (SUF ¶ 13).

Defendants offer unrefuted evidence from Kilgroe's supervisors that he could not perform the essential functions of his job as a wiper. His immediate supervisor, First Engineer Robert Vint ("Vint"), felt his performance was "abysmal . . . from the very beginning." (SUF ¶ 20). Vint's supervisor, Chief Engineer Robert Barrett Wood, Jr. ("Wood"), testified that Kilgroe had "no mechanical aptitude" and "difficulty following even the most rudimentary instructions." (SUF ¶ 21). Kilgroe did not know what an adjustable wrench was, even though his duties as a wiper required him to know tools and be able to retrieve them. (Adams Decl., Ex. C ("Vint Depo."), 15:8-16:6). Kilgroe's supervisors found that he had an "inability to sense danger in his surroundings," which is especially important while working around the machinery in the engine room. (SUF ¶ 11, 12, 14; Adams Decl., Ex. B ("Wood Depo."), Ex. 42). Wood testified that Kilgroe's behavior put the ten other people in the engineering department at risk. (SUF ¶ 26).

Both Vint and Wood testified that Plaintiff could not perform his job as a wiper without constant supervision. (SUF ¶ 22). His supervisors testified that this significantly decreased the productivity of the engine department. (SUF ¶ 25). Wood testified that Kilgroe had a very difficult time remembering his assigned tasks, and repeatedly needed to be given his instructions. (SUF ¶ 23). Wood testified that Kilgroe

was unable to even properly mop the floor, so that the deck looked worse after he mopped it than it had before. (SUF ¶ 20). On one occasion, Wood asked Kilgroe to clean the machine shop, and Kilgroe threw a bucket of cutting tools over the side of the ship. (Vint Depo., 16:17-22). Kilgroe had difficulty remembering where to report during emergency alarms, as well as to which lifeboat and emergency gear locker he was assigned. (SUF ¶ 23). Vint testified that, in an emergency, it "could be disastrous" if Kilgroe did not remember where to report and what to do. (SUF ¶ 24). In a March 15, 2003 e-mail to ASM's personnel department, Wood recommended that "due to [Kilgroe's] lack of memory and his inability to sense danger in his surroundings, he should not be working around machinery." (SUF ¶ 29).

In response to this showing, Kilgroe fails to offer evidence sufficient to create a genuine issue of material fact. Instead, he argues that because he was not fired and no grievances were ever filed against him, he must have been able to perform his job. (SGI ¶ 90). This analysis is faulty and does not constitute evidence that either he was able to perform his job or that his supervisor's evaluation of his performance was inaccurate. Kilgroe further argues that since ASM claims it was unaware of Kilgroe's disability, there is a genuine material issue as to whether he needed accommodations. (SGI ¶ 92). This, too, is not sufficient to create a genuine material issue of fact, because it does not constitute evidence that reasonable accommodations would enable him to perform

his job duties. Instead, Kilgroe actually argues that "[t]he trier of fact may find that plaintiff needs no accommodation's [sic]." (SGI ¶ 92). Without any evidence that he could perform the essential functions of the job, even with reasonable accommodations, Kilgroe cannot prove a necessary element of an ADA claim. Thus, the Court GRANTS summary judgment to Defendants ASM and PCS on Plaintiff's ADA claim.

2. Fourth Claim for Relief (Age Discrimination)

Kilgroe's Age Discrimination in Employment Act ("ADEA") claim requires that he first establish a prima facie case that he 1) was discharged or not hired by Defendants, 2) was over 40 years old at the time, and 3) that his age was a motivating factor in Defendants' decision. 29 U.S.C. §§ 623(a)(1), 631(a). Kilgroe proves the first element, as Defendants acknowledge their decision not to hire Kilgroe for future assignments. (SUF ¶ 31). Kilgroe also satisfies the second element, as Defendants do not dispute his assertion that he was born on March 1, 1941 and was thus over 40 years old at the time of the incident. (FAC, 10:16). Vint makes reference to Kilgroe's age in his e-mail evaluating Kilgroe's performance, meaning that age may have been a motivating factor. Therefore, looked at most favorably to him, Kilgroe has established a prima facie case of age discrimination. (Wood Depo., Ex. 42).

That being so, the burden of production then shifts to Defendants to offer a legitimate, non-discriminatory reason for their actions. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000). Defendants have met that burden. They have provided evidence that they refused to hire Kilgroe because his performance on the *USNS Seay* was unsatisfactory. (SUF ¶¶ 30, 31). "At this point in the analysis, the presumption of unlawful discrimination simply drops out of the picture." *Coleman*, 232 F.3d at 1282 (internal citations omitted). Kilgroe consequently must adduce evidence sufficient to raise a genuine issue of material fact as to whether Defendants' reasons were pretexts for age discrimination. *Id.* He has failed to meet that burden.

Defendants offer extensive evidence of Kilgroe's inability to perform the duties of a wiper, as described in Section II(B)(1) above. (SUF ¶¶ 11, 12, 14, 21-23). "[L]ack of proper qualifications . . . is a legitimate nondiscriminatory reason for laying off an employee." 29 U.S.C. § 623(f)(3); *Coleman* 232 F.3d at 1282 (*citing Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996). As noted above, Kilgroe's only "showing" is his argument that he was able to perform his job satisfactorily, because Defendants did not fire him or file a grievance against him based on his conduct aboard the *USNS Seay*. (SGI ¶ 90). Kilgroe does not, however, offer any evidence that raises a genuine material issue of fact as to whether the justification provided here is a pretext for age discrimination. Vint's e-mail evaluating Kilgroe's performance

begins by mentioning that he "turned 62 during the course of the Voyage," but it focuses overwhelmingly on his lack of qualifications for the job. (SUF ¶ 30; Wood Depo., Ex. 42). This single mention of Kilgroe's age is insufficient to establish that Defendants used his poor performance as a pretext for age discrimination. (SUF ¶ 30; Wood Depo., Ex. 42). Therefore, the Court GRANTS summary judgment to Defendant ASM and PCS on Plaintiff's ADEA claim.

3. Third and Fourth Claim for Relief (California Statutes)

The California statutes in Kilgroe's disability discrimination and age discrimination claims contain elements similar to their federal counterparts. Cal. Government Code §§ 12940, 12941. Courts have applied the same analysis for the purposes of both the federal and state claims. *See Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 271 (9th Cir. 1996). Like the ADA and ADEA, the California statutes do not prohibit employers from refusing to hire a potential employee who is "unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations." Cal. Govt. Code § 12940(a)(1). Based on the analysis above, Kilgroe cannot prevail on these claims, and the Court GRANTS summary judgment to Defendants ASM and PCS on Kilgroe's discrimination claims under California law.

C. Ninth Claim for Relief (Tortious Discharge in Violation of Public Policy)

The Court GRANTS summary judgment to Defendants ASM and PCS on the ninth claim for relief, because Plaintiff offers no support for this claim.

By not later than October 24, 2006, Defendants shall lodge a [Proposed] Judgment.

No hearing is necessary. Fed. R. Civ. P. 78; Local Rule 7-15.

This Order is not intended for publication.

Initials of Preparer /s/ [Illegible]

AGREEMENT

between

Marine Fireman's Union
Pacific District

affiliate

Seafarers International Union of
North America – AFL-CIO

[LOGO]

and

American Ship Management, LLC

in the

Offshore and Intercoastal Trades

JULY 1, 1999 – SEPTEMBER 30, 2005

General Rules, Departmental Rules
and Maintenance (Shoreside) Agreement

* * *

Section 10. Grievance Procedure – Immediate Dispute Resolution

(a) **Grievance Procedure**

The procedures for the settlement of all grievances and disputes which may arise between any of the parties during the life of this Agreement, and the procedures for securing compliance with this Agreement and to prevent violations, shall be as follows:

* * *

Any unresolved disputes or grievances (not settled at Step 1) shall be reduced to writing by the moving party, shall be submitted in writing to the opposite party's designated representative, and shall be jointly investigated and discussed no later than on the day following the day of arrival of the vessel in port, where schedules permit, and in any event no later than the time of payoff.

* * *

Sailors' Union [LOGO] **of the Pacific**

[Addresses And Phone Numbers Omitted In Printing]

May 10, 2005

John Kilgroe
723 East 3rd St., Apt. 3
Long Beach, CA 90802

RE: *Correction and Dismissal of Grievance*

Dear Mr. Kilgroe:

This is to respond to your questions presented in your letter of April 27, 2005. We stand corrected on the point that you were discharged for cause from a Company vessel. You were not. We regret the error.

The correction, however, does not change our understanding that the Company has a legitimate claim that you are not fit for employment on their ships.

As part of our investigation, we discussed with the Company your job performance and reasons for your ineligibility. They cited a shipboard performance evaluation that said you were incapable of performing simple tasks and presented safety risks to both yourself and your shipmates. That information was corroborated by the investigation of the Marine Firemen's Union preceding their denial of your application for an upgrade in seniority. Associated with these interviews, we obtained documentation from the Company supporting these facts.

Ineligibility for hire because of well-established, unbiased evidence of showing a pattern of non-performance and risky behavior we consider a reasonable and

defensible position. Therefore, we consider it a poor use of scarce Union resources to pursue the grievance and herewith dismiss it.

Sincerely,

/s/ Dave Connolly
DAVE CONNOLLY
Vice-President

c: Gunnar Lundeberg
Keith Miller

[LOGO]
PATRIOT HOLDINGS, LLC • AMERICAN SHIP MANAGEMENT, LLC • PATRIOT CONTRACT SERVICES, LLC

[Address And Phone Number Omitted In Printing]

April 5, 2005

Mr. John Kilgroe
723 E. 3rd Street Apt. 3
Long Beach, CA 90802
(S.S. XXX-XX-XXXX)

RE: Ineligibility for Employment

Dear Mr. Kilgroe:

We are writing to confirm that you are permanently ineligible for hire with American Ship Management, LLC ("ASM") or Patriot Contract Services, LLC ("PCS"), due to your inability satisfactorily to perform the work assigned to you, and due to the danger you pose to yourself and your fellow crewmembers.

By way of background, you will recall that during 2003 you worked on board the USNS SEAY, managed by PCS, and that your work performance was the subject of an arbitration in December 2003. In that action, you demanded that the Marine Firemen's Union (MFOW) promote you to Class "C" Seniority, thereby raising the issue, under the MFOW's Shipping Rules, of whether your work on board the USNS SEAY had been satisfactory.

At the arbitration, you admitted that you have Attention Deficit Disorder and "poor shot term visual memory," although you failed to disclose any memory problems at your MSC physical prior to commencing employment on the USNS SEAY (which physical is required by the U.S. Government). Evidence was presented that you were unable to remember instructions given to you, that you were unable to perform simple tasks such as sweeping and mopping, that on one occasion you threw a bucket of valuable hand tools overboard, that other workers had to be assigned to accompany you in order to prevent mishaps from occurring, and that you were unable to remember your lifeboat station. A crewmember's assigned lifeboat station is a critical fact in the event of an emergency, and a crewmember who does not know all such facts could put himself and others (who, for example, might be called upon to rescue him) in danger. The licensed engineers who supervised your work on board the USNS SEAY testified that the engine room of such a vessel is a dangerous area and that a person working in the engine room must be constantly alert to his or her surroundings in order to avoid harm to himself or herself, as well a to co-workers. That characterization applies equally to work in the unlicensed deck department on board a cargo vessel or military vessel.

Arbitrator Thomas Angelo denied your charges against ASM, PCS and the MFOW in a decision dated March 16, 2004. Arbitrator Angelo found that your "performance issues began at the outset of the voyage

and continued at an unsatisfactory level during the remainder of the voyage" on the USNS SEAY. He also found that "the safety implications" of your actions, "standing alone, raise questions as to [your] ability to satisfactorily serve as a Wiper."

Due to your inability to perform even simple tasks satisfactorily, and due to the direct threat of physical harm you pose to yourself and to others in the difficult environment on board a large vessel, ASM and PCS cannot accept you for hire on board any of their vessels.

Respectfully,

/s/ Michael Gillihan
Michael Gillihan
American Ship Management, LLC
Manger, Marine Personnel

CC: Gunner Lundberg, SUP President, San Francisco
Keith Miller, SUP Patrolman, Wilmington